

GASG010012092022



Presented on : 18.10.2022

Registered on : 18.11.2022

Decided on : 29.02.2024

Duration:

Days	Months	years
11	03	01

**IN THE COURT OF DISTRICT JUDGE, SOUTH GOA, AT
MARGAO**

(Before Irshad Agha, Principal District Judge, South Goa, Margao)

MISCELLANEOUS CIVIL APPEAL NO.60/2022.

1. Mr. Agnelo Oliveira
s/o. Jose Oliveira
aged 50 years, service
and his wife (since deceased)

1a. Mr. Fabian Oliveira
son of late Agnelo Oliveira
Aged 27 years, service

1b.Mr. Josefen Desfen Oliveira
Son of late Agnelo Oliveira,
aged 26 years, service

1c.Mr. Milroy Juben Oliveira
Son of late Agnelo Oliveira
Aged 20 years, service
All residents of H.no. 233(3)
Surebhatt, St. Jose De Areal
Salcete, Goa.

Amendment carried out on
25.11.2023 as per order dt.
2.11.2023.

2. Mrs. Fatima Rocha
w/o. Agnelo Oliveira,
aged 47 years,
housewife, both residents of
H.No. 233(3) Surebhatt,
St. Jose de Areal, Salcete, Goa.

... Appellants.

v/s

Late Jose Oliveira
resident of H.No. 233(3)
Sao Jose De Areal, Goa

... Estate Leaver

1. Rosa Figueiredo
w/o. late Jose Oliveira
aged about 79 years,
widow and her son

2. Mr. Santana Olivera
s/o. late Jose Oliveira
aged 41 years, service,
and his wife;

3. Mrs. Priscilla Faleiro
w/o. Santano Oliveira

aged 32 years, housewife
all residing at Maddem
Orlim Salcete Goa

4. Mrs. Francisca Tavares
d/o. late Jose Oliveira
w/o. late Anthony Tavares
aged 55 years, and her son
5. Mr. Joe Tavares
s/o. late Anthony Tavares
aged 37 years, service and his wife
6. Similda Tavares
w/o. Joe Tavares
aged 34 years, housewife;
7. Miss Annie Tavares
d/o. late Anthony Tavares
aged 31 years, unemployed
8. Miss Agnes Tavares
d/o. late Anthony Tavares
aged 27 years, unemployed
all resident of Maddem Orlim
Salcete Goa
9. Mrs. Rosada Tavares
d/o. Jose Oliveira
aged 53 years, housewife
and her husband
10. Mr. Vincent Tavares
h/o. Rosada Tavares
aged 56 years, service
both residents of Maddem
Orlim Salcete Goa

11. Mrs. Filomena Mascarenhas
d/o. Jose Oliveira
w/o. late Andrew Mascarenhas
aged 48 years, and her son
12. Master Aloy Mascarenhas
s/o. late Andrew Mascarenhas
student aged 16 years
13. Miss Valeny Mascarenhas
d/o. late Andrew Mascarenhas
aged 14 years, student all
residents of H.No. 782(2) Mugalli
Sao Jose de Areal
Salcete, Goa.

... Respondents.

Learned Advocate Shri R. Rodrigues present at the time of arguments and Id. Adv. C. D'Souza present at the time of judgment.-.

Learned Advocate Shri A. Cruz for the respondents present at the time of arguments and Id. Adv. Ms. C. Rebello present at the time of judgment.

J U D G M E N T

(Delivered on this the 29th day of the month of February of the year 2024)

This is an appeal arising from the impugned order dated 21.9.2022 passed by the Learned Civil Judge Junior Division at Margao in Regular Inventory Proceedings No. 10/2017/G.

2. The fact of the matter, in brief, is that upon the death of late Jose Oliveira, the Inventory proceedings came to be initiated by the widow of the deceased. She was appointed as Cabeça de Casal and oath was administered. She filed the list of assets showing one property admeasuring 189.17 sq mts with a house existing therein bearing survey no. 32/3 of Sao Jose de Areal being a Mundkarial house. The interested party nos. 3 and 4 filed objection stating that the said house could be listed in the list of assets as it is a Mundkarial house and at the time of the death of the deceased respondent nos. 3 and 4 were in possession of the Mundkarial house with the surrounding area. The objection was dismissed by the impugned order. Hence the present appeal came to be filed by the widow of the deceased and other legal heirs of the deceased. The appeal is preferred by one of the legal heirs of the deceased who claims that he was in possession of the Mundkarial house at the time of the death of the estate leaver.

3. Heard arguments. Learned Advocate Shri R. Rodrigues submitted as under:

i) the said dwelling house could not be listed as list of assets left by the deceased since respondent nos. 3 and 4 inherited the right independently being in possession of the Mundkarial house at the time of the death of the estate leaver.

ii) The respondent cannot have any right in the dwelling house as they were not in fixed habitation at the time of the death of the deceased.

iii) Mundkarial right is heritable under the Mundkarial Act and the appellant herein who are interested party nos. 3 and 4 before the trial court have inherited the Mundkarial right.

iv) The Mundkarial house cannot be divided as it is not an asset and the right was not crystallized in favour of the deceased.

v) As per Section 31 of the Mundkar Act the Civil Court is barred from dealing with the issue of mundkarship.

- vi) Inventory proceedings was initiated somewhere in the year 2011.
- vii) After the death of the estate leaver, the respondent stayed in the said house only for 2 days and as per Mundkar Act to claim to be fixed habitation one has to prove that he or she was in habitation for atleast 2 years.
- viii) He has placed reliance on the judgment in the case of **Mrs. Henriqueta D'Souza vs. Mangesh D. Mishal and ors 2014(7) ALL MR 856** and submitted that the party claiming heritability right has to show that they were in fixed habitation. He also referred in the judgment in the case of **Rama Hegde and ors. vs. Diogo Piedade Rodrigues** decided by the Hon'ble High Court of **Bombay at Goa on 28.7.2014**

4. Per contra learned advocate Shri D'Cruz submitted that Cabeça de Casal is widow of the deceased and she is not allowed to enter the house. That the said house listed in the list of assets is a

house wherein Cabeça de Casal and other children were residing. Under Section 378 of the Succession Act, there is presumption that whatever is stated by Cabeça de Casal is correct and in case there is an opposition or objection an inquiry has to be conducted. The interested party nos. 3 and 4 cannot argue beyond the objection raised to the list of assets as nowhere it is stated that Cabeça de Casal and other legal heirs were not in fixed habitation at the time of the death of the estate leaver. Mundkari rights are heritable and since Cabeça de Casal being the moiety holder and other children have equal right in the said house. Since the estate leaver was mundkar of the said dwelling house, legal heirs do not have to prove that they are in fixed habitation. He has relied on the judgment in the case of **Joaquim D'Costa and ors. vs. Anthony D'Souza alias Joseph Anthony Ignatius Alex Genezano D'Souza and ors 2001(2) Bom.Cr.247.**

5. The point that arises for my determination is “whether the Mundkari house along with the surrounding area can be

considered as assets of the estate leaver” My finding on the same is in the negative for the following:

REASONS

6. According to the respondent, the estate leaver was the mundkar of the dwelling house. According to the appellant there is no any declaration obtained in favour of the deceased estate leaver. It is also the case of the appellant that at the time of the death of estate leaver, the appellants were in fixed habitation of the Mundkarial dwelling house. Therefore, it is appellant themselves who can inherit the right to the said Mundkarial dwelling house.

7. Learned advocate Shri Cruz submitted that the Cabeça de Casal who is moiety holder of the estate leaver and the children were residing in the said dwelling house. Presently the mother who is the moiety holder of the estate leaver is not allowed to enter into the said house.

8. Learned advocate Shri D’Curz has referred to the judgment in the case of **Joaquim D’Costa and ors. vs. Anthony D’Souza**

alias Joseph Anthony Ignatius Alex Genezano D'Souza and ors

supra wherein the Hon'ble High Court of Bombay at Goa has held that the defendant on establishing right of mundkar has to be satisfied by the original mundkar but it is not necessary for the person who inherited from the original bhatkar. Relevant portion of para 7 and 8 of the judgment reads as under:

7. Coming to the contention raised by learned Advocate for the parties that whether the appellate authority or the revisional authority was right in holding that the heir of the mundkar or the legal heir of the mundkar should prove his status as mundkar u/s 29(4) of the Act if he does not reside in the mundkarial house. The Counsel for the respondents No. 1 and 2 has urged before me that Rosy D"Costa has not approached the Mamlatdar as a legal heir of Ana Mascarenhas, but as an independent mundkar. He brought to my attention the application filed before the authority by Rosy D"Costa and pointed out that she claimed independently mundkarial right and

not as a legal heir Ana Mascarenhas. I cannot agree with the submission made by the Counsel for the respondent. It may be noted that all the authorities below have given concurrent finding that Ana Mascarenhas was residing in the house as a mundkar, but she died before registration of mundkarship. Section 3 of the Act provides that the rights of a mundkar in a dwelling house shall be heritable and shall not be transferable. These rights which would devolve on a legal heir of a mundkar, including the right to apply for registration of mundkar. Therefore, merely because the applicant does not show how the applicant has devolved status of mundkar on her, will not deprive her right to inherit the mundkarial right. In the inquiry, of course, the legal heir of the mundkar should demonstrate and prove that the applicant is the legal heir of the original mundkar and therefore, the applicant is entitled for the registration of mundkar.

8. Now, reverting back to the main point which has focused in the opening sentence of this judgment, as I indicated earlier this is a right inheritable which has been declared by the Statute. That right includes right to apply for registration. Fixed habitation which is a factor or a sine qua non enabling a mundkar to apply for registration. That is the only criteria required to be satisfied by the person who claims original mundkarial right against Bhatkar. Once he has become eligible and the said right is conferred on him by operation of statute, the person who inherits his right, need not satisfy the legal requirement of law because Section 3 will, otherwise, become nugatory. What has been stated u/s 3 of the Act is that the right which was already vested in Mundkar is heritable. One must establish two basic things, that is, he must reside there permanently and the stay was without obligation to render any services to the Bhatkar. The factors he must establish as on the date of coming into force of the Act. These two conditions are

the conditions to be satisfied by the original mundkar. It is not necessary for the person who inherits from the original mundkar to satisfy those conditions. It is not contemplated under the Act that legal heir who inherits the right of mundkarship should also satisfy the fixed habitation. When once right of mundkarship is snowballed into statutory rights, it cannot be taken away, if the condition does not exist or to discontinue.

9. The ratio laid down in the above judgment was dealt by the Hon'ble High Court of Bombay at Goa in the case of **Mrs. Henriqueta D'Souza vs. Mangesh D. Mishal and ors.** supra wherein the Hon'ble High Court held that person lawfully residing in the fixed habitation in the dwelling house is mundkar. Person who are in order of succession in terms of Portuguese Civil Code Article 1969 are also included in the ambit of mundkar if they are residing in the dwelling house. The Hon'ble High Court further held that right of mundkar is heritable and it would extend to the member of the family as well as to the successors who are living

with the mundkar at the time of opening of inheritance. The Hon'ble High Court discussed the ratio laid down in Joaquim D'Costa and observed that in the said case the Hon'ble High Court did not examine the aspect of heritability in the context of the provisions of Mundkar Act, 1975 nor noted the objects and reasons of such beneficial legislation. The Hon'ble High Court further observed that if such interpretation is given it would lead to multiple dwelling houses and even extend to a situation whereby the State could inherit a right to a dwelling house.

10. Thereafter in the case of **Rama Hegde and ors. vs. Diogo Piedade Rodrigues** supra the Hon'ble High Court observed and held that right of mundkar is heritable in terms of section 3 of Goa Daman and Diu Munkdar Act to a member of a family and the legal successor of the mundkar in order of succession who are living with the mundkar at the time of obtaining inheritance.

11. Admittedly, except the applicant herein no other person stayed in the said dwelling house. During the course of arguments, it is stated that only for two days, other legal heirs of the estate

leaver had come to reside in the said dwelling house i.e. at the time of the death of the estate leaver which means other member of the family are not residing in the said dwelling house.

12. Mundkarial right are not yet crystallized. Mundkarial right will be determined in connection of the right of the person who are in fixed habitation of the said dwelling house vis-a-vis the landlord of the Mundkarial dwelling house. Since other legal heirs are not residing in the said dwelling house, they cannot claim to be mundkars of the said house. The objection filed by the interested parties has been dismissed by the learned Judge on the ground that the question of fixed habitation does not arise for the interested parties and that the head of the family is not seeking to transfer any right to any person. Unless the Mundkarial rights are not crystallized, the property cannot be of the deceased. Right to stay in Mundkarial house is a different issue. If the interested party obtains declaration of mundkarship on the basis of heritable rights, the same would be considered by the appropriate authority on the basis of fixed habitation. Such an asset cannot be put to division

within the family members. Unless the rights are crystallized, the said house cannot be subject matter of inventory. None of the legal heirs of the deceased have also initiated any proceedings for declaration of mundkarship of having acquired right to the deceased. Amongst all the appellant must have better right since they are in fixed habitation. The moiety holder who is cabeça de Casal might also have right in the Mundkarial dwelling house for as much as claiming Mundkarial right to the said house.

13. In view of the above, I am of the opinion that the said dwelling house which is Mundkarial house alongwith the land appurtenant thereto cannot be subject matter of inventory. The said property shown in the list of assets cannot be considered as assets of the deceased. Therefore, the objection filed by the interested party is maintained. The list of assets filed by the Cabeça de Casal is rejected.

14. I, therefore, pass the following:

ORDER

The appeal is hereby allowed.

The impugned order dated 21.9.2022 passed by the Learned Civil Judge Junior Division at Margao in Regular Inventory Proceedings No. 10/2017/G is hereby quashed and set aside.

Proceedings closed.

Margao.

Dated:29.02.2024

(Irshad Agha)
Principal District Judge,
South Goa,
Margao.

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